STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ROCKWELL UTILITIES, LLC	)	
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Petition for a Certificate of Public Convenience and Necessity to Provide Water and Sanitary Sewer Service to Section 8-406 Of the Public Utilities Act.	)	06-0522
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	)	(Cons.)
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ROCKWELL UTILITIES, LLC	)	
	)	
Petition for a Certificate of Public Convenience and Necessity to Provide Water and Sanitary Sewer Service to Parcels in Lake County, Pursuant to Section 8-406 of the Public Utilities Act.	)	06-0523
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REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission's ("Commission") Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the above-captioned proceeding. On June 15, 2007, Initial Briefs ("IB") were filed in this proceeding by Rockwell Utilities, LLC ("Rockwell"); Northern Moraine Wastewater Reclamation District (the "District") and Staff. Staff herein replies to the District's IB and has no replies to Rockwell.

I. THE DISTRICT'S PREEMPTION ISSUE

A. Federal Preemption and State Water Law

The most important factor to consider in any preemption analysis is the intent of Congress. California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987). In fact, there is a "presumption" against the finding of a preemptive conflict between state and federal law. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Particularly where Congress is regulating "in a field which the States have traditionally occupied," courts "start with the assumption" that the State's authority was "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation omitted). In this case, Congress has continued to demonstrate respect for state water law regimes and to encourage "cooperative federalism." [1]

As described by the District, the two most common areas of preemption occur when a state statute violates: 1) the Commerce Clause such as in the case cited by the District stating, "Rockwell and the District cannot both provide wastewater treatment in the Subject Area. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility")" (District IB, p. 12). In Florida Lime, Florida brought this suit to oppose the California law, which it argued discouraged its right to engage in interstate commerce; and 2) in immigration law such as with another case the District cites stating, "…an actual

[1] Black's Law dictionary defines "cooperative federalism" as, "The distribution of power between national and local state governments while each recognizes the powers of the other." Black's Law dictionary Fifth Edition).

conflict exists when a state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress in enacting federal legislation. Hines v. Davidowitz, 312 U.S. 52 (1941)." (Id.). In Hines, the immigration case involved the validity of an Alien Registration Act adopted by the Commonwealth of Pennsylvania.

Unlike the Commerce Clause or Immigration case law cited by the District, the preemption issue in the instant case is specific to federal preemption and state water law or more specifically the Clean Water Act ("CWA"). As stated by the District, "The CWA and its regulatory scheme for wastewater treatment serve important federal policies including "the national policy that areawide waste treatment management processes be developed and implemented to assure adequate control of sources of pollutants in each State." 33 U.S.C. § 1251(5)" (District IB, p. 6). As in this case, the State's authority was "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation omitted).

In the instant proceeding there is no preemption infringement, where Rockwell received the proper Illinois Environmental Protection Agency ("IEPA") permits and adhered to the proper water quality standards. In this case, the CWA's regulatory scheme was honored. Thus, the purpose of the federal legislation and objectives of Congress were accomplished and no preemption applies. In view of that: 1) The District has the ability to carry out its duties and obligations pursuant to the Sanitary District Act of 1917 (70 ILCS 2405/1 et seq.); 2) The IEPA can fulfill its responsibilities, which include administering the

regulatory wastewater scheme established by the CWA as described below; and 3) Rockwell may provide wastewater treatment to the subject area.

B. CWA Authority Lies with the IEPA − not the District

The District cannot have its cake and eat it too. On the one hand, the District defines the broad authority of the IEPA. For instance, the District refers to the Inland Steel case stating, "**In the State of Illinois, the Illinois EPA has the authority to administer this regulatory wastewater scheme established by the CWA**." Emphasis added. (District IB, p. 7, citing 415 ILCS 5/39; Inland Steel Mortgage Acceptance Corp. v. Carlson, 154 Ill. App.3d 890, 507 N.E.2d 213, 214 (2d Dist. 1987). The District goes on to say, "In administering the [Water Quality Management Plan] WQMP, **the Illinois EPA is the designated agency of the State for purposes of carrying out the mandates of the CWA**. 415 ILCS 5/1004(m)". Emphasis added (Id.).

But on the other hand, while the IEPA issued permits to Rockwell's predecessor, Lakemoor Building Corporation (wastewater treatment operation for the Jupiter apartments), from 1987 to January 2007 and the IEPA recently approved Rockwell's permit to operate the facilities (Rockwell IB, pp. 2-3), the District now cries fowl. The District states, "Nor can Rockwell, the Staff, or the Illinois Environmental Protection Agency ("Illinois EPA") ignore these requirements [of the CWA] simply because Rockwell has obtained Illinois EPA permits to operate in the Subject Area." (District IB, p. 6). The District's argument fails as circular reasoning. In other words, if the IEPA has the authority to carry out the wastewater scheme of the CWA and it has awarded permitting to

Lakemoor for the past twenty years and now to Rockwell, then there is no preemption violation. The Northern Illinois Planning Commission and the Designated Management Agency (such as the District), may have an advisory role to play and may make recommendations to the IEPA, but the ultimate decision making authority on permitting issues and the State's WQMP lies with the IEPA.

C. The Commission Should Find Against or Completely Disregard the District's Preemption Argument

Whatever its merits – and Staff believes it is without merit – the preemption argument cannot be successfully raised before the Commission. Either the Commission should determine that the District has not demonstrated a legitimate preemption case for the reasons described above and therefore preemption does not apply here,[2] or the Commission could choose not to address the preemption issue. [3] For instance, the Commission has previously declined to decide the preemption question. *See, e.g.,* Order Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614, p. 18-19, ¶42, (June 11, 2002). Thus, if the District considers the Commission's enforcement of a valid State law (Section 8-406 of the Act) to be preempted by federal statute (i.e., the CWA), it certainly has remedies, but not before the Commission.

[2] "Preemption ultimately is a political act in our federal system for which Congress or the Executive should be accountable. The judiciary is not in a position to make policy judgment, and pre-emption is not to be lightly presumed." Qwest Corp., 380 F.3d at 374 (internal quotations omitted).

[3] The Commission is a creature of state law, and bound by the acts of the General Assembly. City of Chicago v. Illinois Commerce Commission, 79 Ill. 2d 213, 217-18 (1980); Illinois Bell Telephone Co. v. Illinois Commerce Commission, 203 Ill. App. 3d 424, 438 (1990).

Staff sees no preemption issue here whatsoever. Yet, Staff is utterly unaware of why the District has not addressed this matter with the IEPA or taken their case to a federal or state court and instead has waited nearly two decades to raise a federal CWA preemption argument in front of the Commission.

Nevertheless, either preemption does not exist or the Commission could choose not to address the preemption question. In either case, the relevant determination for the Commission is whether Rockwell has met its burden under Section 8-406 of the Act.

II. THE DISTRICT'S "ADDITIONAL REASONS" REQUIRING COMMISSION DENIAL OF ROCKWELL'S CERTIFICATE ARE SERIOUSLY FLAWED

The District first argues that "[t]he entire process before the Commission has been contaminated by the inexplicable position of Rockwell and Staff that there is an "emergency" that only Rockwell can abate." (District IB, p. 16). Apparently, the District misunderstands this phase of the consolidated proceeding. The "emergency" to which the District refers was a critical portion of the initial phase of the proceeding wherein the Commission considered whether to grant Rockwell a Temporary Certificate pursuant to Section 8-406(e) of the Act. As Section 8-406(e) of the Act states, in pertinent part:

> The Commission may issue a temporary certificate which shall remain in force not to exceed one year **in cases of emergency**, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this Section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. 220 ILCS 5/8-406(e). Emphasis added.

As such, a Commission finding that an emergency existed was necessary. However, the Commission acted on the emergency in its August 16, 2006 Interim Order when it granted Rockwell its Temporary Certificate. Since that phase of the proceeding has concluded, the District's comment regarding an emergency is misplaced and irrelevant and should be disregarded.

The District continues its absurd discourse on "additional reasons" by arguing that Staff has "failed to follow even the most basic requirements of Section 8-406 to ensure that Rockwell is in fact the least cost option." (Id.). Staff strongly disagrees. Staff has diligently conducted its analysis pursuant to each and every requirement in Section 8-406 of the Act.

A. Facilities Plan Amendment

The District inappropriately continues to argue against the Administrative Law Judges' June 8, 2007 Ruling that struck District witness Michaels' testimony, including the attached Facilities Plan Amendment. (District IB, p. 16). Staff submits that this continued losing argument in the District's Initial Brief is misplaced and inappropriate. As such, it should be disregarded by the Commission.

B. Least-Cost Provider

The District argues that Staff failed to consider the issue of sustainability regarding whether Rockwell is the least-cost service provider. (District IB, p. 16). Staff believes that the District's mere assertion that the lack of ability to finance renders the operations of the system as something other than least-cost is, in and of itself, an unsustainable argument.

Staff witness Freetly's testimony is quite clear: Pursuant to Section 8-406(b)(3) of the Act, Rockwell is capable of financing the operation and maintenance of the facilities for which certification is requested due to the obligation of The Kirk Corporation ("Kirk") to provide Rockwell with debt and equity capital in accordance with the Operating Agreement. Thus, Ms. Freetly determined that Rockwell would have adequate access to capital because of its relationship with Kirk. (ICC Staff Exhibit 3.0; ICC Staff Exhibit 8.0). The District's rash assertion that, "[t]he record is devoid of adequate analysis of whether Rockwell is a financially sustainable entity" (District IB, p. 16) is simply incorrect.

Staff witness Smith's testimony is also quite clear: Pursuant to Section 8-406(b)(1) of the Act, based on the information available to him, including the observation that no other utility is currently capable of providing water and sewer service to Rockwell's customers, Rockwell's proposal represents the least-cost option for satisfying the service needs of the customers in the subject area. (ICC Staff Exhibit 2.0, p. 7). What the record is truly devoid of is evidence that the District is operationally able at this time to serve these water and sewer customers.

The District also muddies the water by accusing Staff of refusing to consider the "clear" testimony of District accountant George Roach. (District IB, p. 16). As discussed in Staff's Motion to Strike and Reply, Mr. Roach's pre-filed testimony addressed issues and exhibits that are not part of the evidentiary record in the instant proceeding. If Mr. Roach's "clear" testimony had been relevant to the instant proceeding, Staff would certainly have considered it.

C. Federal and Other State Laws

The District accuses Staff of refusing to consider any Federal Laws and any State Laws other than the Public Utilities Act. The District's support for this allegation is twisting and misinterpreting a statement made by Staff witness Smith under cross-examination. (District IB, pp. 16-17). Since Mr. Smith is not an attorney[4], he would not have occasion to consider the relevancy of other laws, if in fact, other laws might even be relevant. Mr. Smith's task at hand was to investigate Rockwell's request for a Permanent Certificate pursuant to the criteria set forth in Section 8-406 of the Act. Because Mr. Smith was required to use Section 8-406 of the Act, it would have been absurd for him to troll Federal and State statutes looking for additional laws.

III. CONCLUSION

For the foregoing reasons, Staff respectfully requests that the Commission grant Rockwell's request for a Permanent Certificate in the instant consolidated proceeding in accordance with Staff's recommendations set forth in both Staff's testimony and Initial Brief. Furthermore, for the reasons discussed above, Staff respectfully requests that all of the arguments advanced in the District's Initial Brief be rejected. In addition, Staff vehemently rejects the District's suggestion that Staff recommend that Rockwell's Temporary Certificate be rescinded (District IB, p. 16), since that request would be contrary to the evidentiary record and rescission would leave customers in that area without access to sewer and/or water services.

[4] While Mr. Smith is a quite capable and very experienced utility policy analyst, he is neither an attorney nor a "Lead Investigator".

Respectfully submitted,

/s/_____
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June 22, 2007

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